

### REMARKS

Claims 1, 4-6, 8-12, 23-29, 31-39, 41-46, and 61 are amended and will be pending in this application upon entry of this amendment. Claims 2-3, 7, 13-22, 30, 40 and 47-60 have been cancelled.

The Office Action mailed June 25, 2009 has been carefully reviewed and the following remarks have been made in response.

The undersigned wishes to thank the Examiner for the courtesies extended at the personal interview of October 14, 2009. The claims and prior art were discussed, and Mr. Chris Dalton demonstrated prior art products as well as a product embodying aspects of the invention. No agreement was reached, but the Examiner made several suggestions for claim amendments that are incorporated herein.

As discussed in the interview, breath testing devices typically are used by police officers when assessing whether a driver has consumed an amount of alcohol in excess of the legal limit in that particular jurisdiction. Typically, this assessment is made at night, on the side of the road. Police officers have several concerns when performing an alcohol breath test, including safety. For safety reasons, an officer typically would prefer positioning himself in a sideways stance relative to the subject, and hold the breath testing device in one hand, i.e., hold the device using only his non-weapon hand outstretched towards the subject. In this position, a potentially belligerent subject is kept at arm's length and at the opposite side of the officer's weapon, so the subject cannot grab the officer or any of his equipment. Also, the officer's other hand is kept free and accessible to his gun or other non-lethal weapons that may be needed.

When in this position, the officer also can keep his face comfortably turned on the subject to observe the subject throughout the entire test. Specifically, there are generally subject-blowing cues on the display that the officer needs to observe while also observing the subject.

Further, during a test, a subject should not be able to view the device display. If the subject can view the display during a test, the subject may try to manipulate the manner of blowing, which may diminish the ability of the officer to get the best breath test result. Also, the subject's discard breath should not be directed at the officer for health reasons.

#### Claim 1

Claim 1, as amended, is patentable over U.S. Patent No. 6,468,222 to Mault et al. (hereinafter referred to as "Mault") in view of U.S. Patent No. 6,319,199 to Sheehan et al. ("Sheehan"), U.S. Patent No. 4,233,842 to Raemer et al. ("Raemer"), and U.S. Patent No. 3,880,591 to Burroughs ("Burroughs"). If one considers these references without the benefit of hindsight, the references fail to teach or suggest the claimed alcohol breath testing device housing.

Mault describes a calorimeter 10 for measuring the metabolic rate of a subject and includes, among other configurations, a mouthpiece 20 (or mask 17) and a display 18 on the opposite side of the calorimeter from the mouthpiece. Sheehan describes a portable data collection device for diagnosing data, specifically, configured for insertion into a patient's ear canal. Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that "[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel." *See* Raemer, Column 6, lines 54-57.

Burroughs describes a breath testing device having a tubular inlet and a mouthpiece including a cup-shaped receiver member and a stem member. As illustrated in FIG. 2 of Burroughs, the stem member couples the cup-shaped receiver member to the breath testing device. The tubular inlet of Burroughs, which the Office has characterized as corresponding to the claimed mouthpiece interface, is circular in cross-section and not generally U-shaped as recited in claim 1. None of the other references teach or suggest this feature nor does the Office assert that they do.

Applicants respectfully submit that the Office is using impermissible hindsight to craft its rejection of claim 1. The U.S. Supreme Court reaffirmed that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning." See MPEP 2141 and *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 USPQ2d at 1397. Admittedly, a selection of references like the above can be pieced together to form the claimed invention, but such "piecing together" of references is not the basis for a proper rejection.

Following the Supreme Court's guidance provided in *KSR* with respect to impermissible hindsight, a person of ordinary skill in the art having common sense at the time of the invention would not have reasonably pieced together the various teachings of Mault, Raemer, Sheehan and Burroughs. None of these references are directed to facilitating and ensuring the safety of a roadside sobriety test. Thus, the suggestion for combination must have been gleaned from the present application, rather than from the references or from the common sense of one of ordinary skill.

The claimed alcohol breath testing device housing is advantageous because it facilitates better field sobriety tests. For safety reasons, an officer typically would prefer positioning himself in a sideways stance relative to the subject, and hold the breath testing device in one hand, i.e., hold the device using only his non-weapon hand outstretched towards the subject. In this position, a potentially belligerent subject is kept at arm's length and at the opposite side of the officer's weapon, so the subject cannot grab the officer or any of his equipment. Also, the officer's other hand is kept free and accessible to his gun or other non-lethal weapons that may be needed.

When in this position, the officer also can keep his face comfortably turned on the subject to observe the subject throughout the entire test. Specifically, there are generally subject-blowing cues on the display that the officer needs to observe while also observing the subject.

During a test, a subject should not be able to view the device display. If the subject can view the display during a test, the subject may try to manipulate the manner of blowing, which may diminish the ability of the officer to get the best breath test result. Additional advantages of the claimed device housing are described in the Background section of the application.

The four cited references, whether considered alone or in combination, fail to teach or suggest the advantages and the structure of claim 1. Accordingly, for at least the reasons set forth above, Claim 1 is submitted to be patentable over Mault in view of Shechan, Raemer, and Burroughs. Claims 4-6 and 8-12 depend from independent Claim 1 and are likewise patentable over Mault in view of Shechan and further in view of Raemer and Burroughs.

#### Claim 23

Amended claim 23 is directed to an alcohol breath tester housing assembly for a breath tester. The housing assembly comprises:

- a housing comprising a base, a display, and a mouthpiece interface, said base being adapted to be gripped by an operator during testing, said display being oriented with respect to said housing to be in line with an operator's direct line of view while gripping said base;

- a mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising an elongate body comprising at least one substantially planar surface, an open end, and a closed end, the closed end and substantially planar surface of the mouthpiece being placed against the mouthpiece interface in a testing position; and

- an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in a subject by the subject blowing into the mouthpiece.

Neither Mault nor Raemer, whether considered alone or in combination, teaches or suggests a breath tester housing assembly as is recited in Claim 23. More specifically, neither Mault nor Raemer teaches or suggests a breath tester housing assembly that includes a

mouthpiece configured to be removably coupled to said mouthpiece interface, said mouthpiece comprising an elongate body comprising at least one substantially planar surface, an opened end, and a closed end, the closed end and substantially planar surface of the mouthpiece being placed against the mouthpiece interface in a testing position.

Mault describes a calorimeter for measuring the metabolic rate of a subject and includes a mouthpiece that snaps over a flange, and Raemer describes a technique for measuring the presence of selected fluids within expired air but fails to disclose the structure for such a device, merely stating that “[t]he subject invention is also adaptable for non-clinical applications, such as measurements of blood alcohol content by law enforcement personnel.” *See* Raemer, Column 6, lines 54-57.

Applicants respectfully submit that the Office is also using impermissible hindsight to craft its rejection of claim 23. Following the Supreme Court’s guidance provided in *KSR* with respect to impermissible hindsight, a person of ordinary skill in the art having common sense at the time of the invention would not have reasonably pieced together the various teachings of Mault and Raemer. These references are NOT directed to the problem solved by applicants’ invention. Thus, the suggestion for combination must have been gleaned from the present application, rather than from the references or from the common sense of one of ordinary skill.

Accordingly, Claim 23 is submitted to be patentable over Mault in view of Raemer. Claims 24-29 and 31-35 depend from independent Claim 23 and are likewise patentable over Mault in view of Raemer.

#### Claim 61

Amended Claim 61 is directed to an alcohol breath testing device comprising:

a base to be gripped by either hand of an operator and having a front edge and an opposite back edge;

a display oriented on the front edge and configured for alignment with the operator's direct line of view while gripping the base during use of the breath testing device;

a removable mouthpiece extending away from the display, the mouthpiece including at least one port for channeling air blown into the mouthpiece by a subject into the breath testing device and a discard breath outlet oriented such that discard breath is not directed at the operator of the breath testing device during testing when the operator views the display;

a mouthpiece interface for receiving the removable mouthpiece, said mouthpiece being configured to pivotally couple with the mouthpiece interface, the mouthpiece interface and mouthpiece being oriented with respect to the base such that, when the operator holds the base in either hand and stands in front of the subject, and the subject blows into the mouthpiece, the display is not in the direct line of view of the subject; and

an alcohol sensor in fluid communication with the mouthpiece and mouthpiece interface, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

Neither Mault nor Raemer, whether considered alone or in combination, teaches or suggests a breath testing device housing as is recited in Claim 61. More specifically, neither Mault nor Raemer describes or suggests a breath testing device housing that includes 1) a display oriented on the front edge (as explained above with respect to Claim 1) or 2) a mouthpiece being configured to pivotally couple with the mouthpiece interface. Applicants again submit that the Office is also using impermissible hindsight to craft its rejection of claim 61. These references are directed to problems completely different from those of the present invention, and they do not have the advantages of the claimed construction.

As described in the Background of the present application, the positioning of the display is important for a safe field sobriety test. And a mouthpiece that easily couples with the mouthpiece interface enables the Officer to attach the mouthpiece without taking his eye off of the subject. For all the above reasons, Claim 61 is patentable over Mault in view of Raemer.

Claims 36

Amended Claim 36 is directed to an alcohol breath tester housing assembly for a breath tester. The housing assembly comprises:

a housing comprising a base and a display, said base being configured to be gripped by an operator during testing, said display being oriented with respect to said housing to be in line with the operator's direct line of view while gripping said base and while the operator stands in front of a subject in a sideways stance;

a mouthpiece configured to be removably coupled to said housing and to extend obliquely from said housing, said mouthpiece being configured to be pivotally coupled to said housing; and

an alcohol sensor in fluid communication with the mouthpiece, the alcohol sensor being adapted to detect alcohol present in the subject by the subject blowing into the mouthpiece.

Claim 36 is patentable over Mault in view of Raemer and U.S. Patent No. 5,303,575 to Brown et al. (hereinafter referred to as "Brown") in that neither Mault, Raemer nor Brown, whether considered alone or in combination, teach or suggest a breath tester housing assembly that includes a mouthpiece configured to be removably coupled to the housing and extend obliquely from the housing and wherein the mouthpiece is configured to be pivotally coupled to the housing.

Brown describes an automated unsupervised apparatus for conducting a blood alcohol content level test on an individual. The apparatus includes a housing having a display and an opening for receiving a straw. The Office asserts that the straw (24) of Brown extends obliquely from the housing (21). However, nowhere does Brown support this position. As clearly seen in FIG. 1A, the straw extends perpendicularly to the housing and not obliquely. Mault and Raemer also fail to teach or suggest a mouthpiece configured to extend obliquely from a housing. This feature is advantageous because it does facilitate better positioning of the housing relative to the officer and the subject.

Moreover, neither Mault nor Raemer teach or suggest a mouthpiece that is pivotally coupled to a housing. Brown also fails to teach or suggest this feature of Claim 36. This feature is advantageous because, as discussed above, it enables the officer to keep his attention on the subject, rather than on the breath tester. Thus, claim 36 is patentable over Mault, Raemer and Brown in that these references fail to teach or suggest a mouthpiece that is pivotally coupled to a housing.

Claim 36 is submitted to be patentable over Mault in view of Raemer and Brown. Claims 37-39 and 41-46 depend from independent Claim 36 and are likewise patentable over Mault in view of Raemer and Brown.



**CONCLUSION**

In view of the above, all the claims in this application are in condition for allowance. Applicants request reconsideration and favorable action.

The undersigned respectfully requests a telephone call from the Examiner if a call might expedite the allowance of the application.

The Commissioner is hereby authorized to charge the fee of \$130.00 for a one-month extension, and any additional fees in connection with this Amendment to Deposit Account No. 01-2384 in the name of ARMSTRONG TEASDALE LLP.

Respectfully submitted,

/Michael G. Munsell

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